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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1940**

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# No. 128

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EMIL MOSBACHER,

*Petitioner,*

*vs.*

THE UNITED STATES.

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**PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.**

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MARK EISNER,
FERDINAND TANNENBAUM,
*Counsel for Petitioner.*

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## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

---

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Claims entered on January 8, 1940 (R. 20) and reported in 30 F. Supp. 703.

### Jurisdiction.

Review is sought pursuant to the provisions of § 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939. The time to file this petition was extended by orders of Chief Justice Hughes, signed on March 26, 1940 and on May 8, 1940, until June 7, 1940.

### Question Presented.

Whether, under § 23(r) of the Revenue Act of 1932, petitioner may offset losses on the sale of non-capital securi-

ties owned by him as an individual against his 91% share of the profits of a partnership derived from the sale of non-capital securities.

**Statute Involved.**

Section 23(r)(1) of the Revenue Act of 1932 provided as follows (47 Stat. 169):

> "(r) *Limitation on Stock Losses.*—
>
> (1) Losses from sales or exchanges of stocks and bonds (as defined in subsection (t) of this section) which are not capital assets (as defined in section 101) shall be allowed only to the extent of the gains from such sales or exchanges * * *."

**Statement.**

Petitioner sued in the Court of Claims to recover an overpayment of individual income taxes for the year 1932 in the sum of $64,802.76. Petitioner contended that he should be permitted to deduct a loss in the sum of $130,434.27 upon the sale of non-capital securities from his share of profits on the sale of non-capital securities in the sum of $128,476.17. Respondent contended that the set-off should not be allowed for the reason that the security profits had been realized by a partnership.

The Court of Claims found that, during the year 1932, petitioner was a member of a partnership, and that his share of the net profits of the business was 91% (R. 12). The court found that the Commissioner had refused to allowed petitioner to deduct individual losses on the sale of securities held less than two years in the sum of $130,349.89 against his distributive share of partnership security profits in the sum of $128,476.17 because of the fact that said profits had been realized through a partnership (R. 11).

The court held for the Government (R. 14-16), following the decisions of the Second Circuit in *Johnston* v. *Commissioner*, 86 F. (2d) 732, and of the Court of Claims in *Klingenstein* v. *United States*, 18 F. Supp. 1015, to the effect that individual security losses may not be offset against partnership security profits.

**Specification of Errors.**

1. The Court of Claims erred in holding that petitioner could not offset losses from the sale of non-capital securities owned by him individually against his 91% share of profits from the sale of similar securities realized by him and others in partnership.

2. The court below erred in giving judgment for respondent.

**Reasons for Granting the Writ.**

1. The question whether individual security losses may be offset against partnership security profits is now before the court in the case of *Neuberger* v. *Commissioner of Internal Revenue*, October Term 1939, No. 548, certiorari granted on May 27, 1940. In that case the Second Circuit followed its earlier decision in the *Johnston* case, *supra*, and refused to permit *Neuberger* to offset his individual security losses against his share of partnership security profits. This court's order of May 27, 1940, granted certiorari on this question.

Since the question presented by this case is already before the court in the *Neuberger* case, certiorari should also be granted in this case.

2. In following the *Johnston* and *Klingenstein* cases, the court below was applying the rule that partnership security profits do not retain their identity in the partner's hands under a statute limiting the deductibility of security losses

to security profits. This decision conflicts with decisions of the Fifth and Sixth Circuits. In *Jennings* v. *Commissioner*, 110 F. (2d) 945, decided by the Fifth Circuit on April 11, 1940, it was held that partnership gambling profits retain their identity in the partner's hands, and that therefore individual gambling losses may be offset against them under a statute limiting the deductibility of gambling losses to gambling profits. In *United States* v. *Coulby*, 258 Fed. 27, the Sixth Circuit held that a partner's share of partnership dividend income retained its identity in the partner's hands, and was therefore free of normal tax under a statute exempting individuals from normal tax on dividend income.

Since the decision of the court below is in conflict with the decisions of two circuits on a question of Federal tax law, this is a proper case for review by this Court, especially as the question whether the particular type of partnership income here involved (partnership security profits) retains its identity and may be offset by individual security losses is already before the court in the *Neuberger* case, *supra*.

Wherefore, it is respectfully submitted that the petition for certiorari should be granted.

MARK EISNER,
FERDINAND TANNENBAUM,
*Counsel for Petitioner.*

June, 1940.

FILED
AUG 14 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

October Term, 1940

No. 128

EMIL MOSBACHER,

Petitioner,

v.

THE UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CLAIMS

## REPLY MEMORANDUM FOR PETITIONER

MARK EISNER,
FERDINAND TANNENBAUM,
Counsel for Petitioner.

August, 1940.

Edward Leven—New York City

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ON PETITION FOR WRIT OF CERTIORARI
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## REPLY MEMORANDUM FOR PETITIONER

The Government's memorandum in opposition concedes that the question presented by the petition for certiorari is the same as that now pending before the Court in *Neuberger* v. *Helvering*, No. 5, October Term 1940 (whether individual security losses may be offset against partnership security profits).

The Government concedes that the court below applied the rule of the *Neuberger* case, and that under such circumstances it "would ordinarily be inclined to acquiesce in the petition". It opposes certiorari with some doubt because of a "procedural impediment" said to arise from petitioner's failure to have attacked the rule of the *Neuberger* case in the court below.

The Government cites no authority which holds such failure to be an impediment where, as here, the record presented the point, the Government brief argued it, and

the court decided it, but contents itself with a reference to one "compare" citation, which is not at all in point (see II below).

This reply memorandum will briefly demonstrate that (1) there is no good reason why, on the facts of this case, the question presented by the petition for certiorari should not be reviewed by the Court; (2) neither the *Minnesota Tea* case, cited by the Government, nor any other, denies petitioner's right to review in this Court on the facts of this case; and (3) the Government's contention is belated, in view of its recent assertion that the court below *did, in this case, decide* the same question as is now before the Court in the *Neuberger* case.

## I.

### There is no good reason why, on the facts of this case, the question presented by the petition for certiorari should not be reviewed by the Court.

The rule frequently stated by this Court is that it will not ordinarily review questions not raised *or passed upon* below. *Blair* v. *Oesterlein Co.*, 275 U. S. 220, 225. There is no case in which this Court has refused to review a point which *was* passed upon below (Point II *infra*).

The purpose of the rule is clear, justice to subordinate courts requiring "that their alleged errors should be called directly to their attention, and that their actions should not be reversed upon questions which the astuteness of counsel in this Court has evolved from the record". *J. M. Robinson & Co.* v. *Belt,* 187 U. S. 41, 50.

As the record in the court below is replete with references to the issue now before this Court, and as that court

passed on the point, both the rule and the reason therefor are inapplicable to this case:

A. The question presented by the petition to the Court of Claims was whether on the facts set forth petitioner was entitled to recover (R. 1-5). He could recover on either of two grounds: (1) If individual security losses could be offset against partnership security profits; or (2) if the security profits in this case were individual rather than partnership profits. The petition requested that the deduction be permitted, without limiting the reasons therefor.

B. Petitioner's claim for refund presented both points (Finding 6, R. 8-9).

C. The court below found that the parties had by agreement suspended the statute of limitations in this case awaiting the decision of the Circuit Court of Appeals in *Klauber* v. *Commissioner* [34 B. T. A. 998], the sole issue in which was the right to offset individual security losses against partnership security profits (Finding 5, R. 8).

D. The court below found that the Commissioner rejected the claim for refund on the ground that individual losses could not be offset against partnership profits (R. 9).

E. The Government brief below recognized that the right to such setoff was involved in the case, urging that the *Johnston* and *Klingenstein* cases had settled the rule that the profits, treated as partnership profits, could not be offset by individual losses (Government brief below, p. 55).

F. The court below, four of the judges of which had also sat in the *Klingenstein* case, cited and stated the rule of the

*Klingenstein* and *Johnston* cases in its opinion (R. 14). The concluding paragraph of the opinion adopts the rule of those cases, the court holding that there was a partnership "and, *accordingly*, that plaintiff is not entitled to the deduction" (R. 16, italics ours). The court could not have reached this conclusion without following the rule of the *Klingenstein* and *Johnston* cases.

Thus the record in the court below is replete with references to the issue now before this Court, the question was specifically called to the court's attention by the Government brief, and the court below decided the point and referred to it in its opinion. Under these circumstances, the rule that questions not raised or passed upon below are not considered here has no application to this case.

## II.

### Neither the *Minnesota Tea* case nor any other denies petitioner's right to review in this Court on the facts of this case.

A careful search has failed to reveal a single case in which this Court has refused to review a question of law because of petitioner's failure to have argued it below, where the record presented the point, respondent discussed the point in its brief, and the court below passed on the point by express reference thereto in its opinion.

Even the rule that this Court will not consider questions *not* passed upon below has in practice been subjected to many exceptions. The rule is not a rigid one, and confers a discretion which may be exercised at any time no matter what may have been done before.

At one time this Court's statement of the rule that it will

not consider matters not passed upon below excepted "fundamental" and jurisdictional points. *Grant Bros. Construction Co.* v. *United States,* 232 U. S. 647, 660.

But in *West* v. *Edward Rutledge Timber Co.,* 244 U. S. 90, 99, 100, the Court considered points not raised or passed upon below "in deference to the earnestness of counsel," dismissing as "artificial" the distinction made in the earlier cases between fundamental and jurisdictional points, and other points.

This Court has reversed a Circuit Court of Appeals for refusing to consider an error which had not been properly raised. *Pierce* v. *United States,* 255 U. S. 398, 405-6. It has affirmed a Circuit Court of Appeals which reversed the trial court on a ground improperly presented. *Lamb* v. *Cramer,* 285 U. S. 217, 222; *Friend* v. *Talcott,* 228 U. S. 27, 36.

In other types of cases, this Court has reversed because of errors not raised below, even though not assigned as error in this Court. *United States* v. *Tennessee & Coosa R. Co.,* 176 U. S. 242, 256; *United States* v. *Williams,* 278 U. S. 255, 256; *Mahler* v. *Eby,* 264 U. S. 32, 45; *Weems* v. *United States,* 217 U. S. 349, 362.

Into this pattern of cases, *Helvering* v. *Minnesota Tea Co.,* 296 U. S. 378, 380, fits perfectly. This is the only case cited by the Government to establish the "procedural impediment" to review of this case. The question in the *Minnesota Tea* case was whether the acquisition by one corporation of substantially all the properties of another was a reorganization for tax purposes. It was stipulated by the parties in the Board of Tax Appeals that there had been a transfer by the one corporation of all its assets to the other.

No point to the contrary was raised in the Board of Tax Appeals nor before the Circuit Court of Appeals. In its petition for certiorari, the Government for the first time took

the position that there had not been an acquisition of substantially all the properties. This Court properly refused to consider the point, saying (296 U. S. at 380):

> "The petition also stated that, as the taxpayer made an earlier conveyance of certain assets, the later one, here in question, of what remained to the Grand Union Company did not result in acquisition by one corporation of substantially all property of another. This point was not raised prior to the petition for certiorari and, in the circumstances, we do not consider it."

The question had not been presented to either of the lower tribunals, and was one of fact, as to which the stipulation of facts contradicted the new contention.

Thus the decisions of this Court lend no support to the Government's "procedural impediment" argument in a case where, as here, the point was presented to the lower court by the record, was discussed in the Government brief, and passed on by the court by express reference in its opinion.

## III.

**The Government has previously contended that the Court below in this case decided the same issue as did the Second Circuit in the *Neuberger* case.**

In opposing certiorari in the *Neuberger* case, the Government filed a memorandum with this Court in February, 1940, on page 2 of which appears the following comment:

> " * * * the precise question involved in the present case was decided against petitioner's position by the Court of Claims less than a month prior to the decision in

the *Craik* case. *Mosbacher* v. *United States,* decided January 8, 1940."

In a footnote, the Government supported this statement by quoting the portion of the *Mosbacher* opinion which cites the *Klingenstein* and *Johnston* cases (see R. 14). Thus the Government opposed certiorari in the *Neuberger* case on the ground that the court below in this case *had decided* the point, but now opposes certiorari in this case on the ground that there is a "procedural impediment" to the decision of the point.

## CONCLUSION.

The question whether petitioner's individual security losses may be offset against partnership security profits is properly presented and is the same question as is now before the Court in the *Neuberger* case. Hence, certiorari should be granted. But if there is any lingering doubt in the Court's mind as to whether the issue of law is properly before the Court, then, there being no decisive authority on the procedural point, justice requires that petitioner have an opportunity fully to brief and argue the procedural point in an argument on the merits. Justice will not be served by accepting the thin technical argument of the Government, unsupported by previous judicial decision, without giving petitioner an opportunity to be heard.

Respectfully submitted,

MARK EISNER,
FERDINAND TANNENBAUM,
Counsel for Petitioner.

August, 1940.

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# In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 128

EMIL MOSBACHER, PETITIONER

*v.*

THE UNITED STATES

*ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court below (R. 14–16) is reported in 30 F. Supp. 703.

### JURISDICTION

The judgment of the court below was entered January 8, 1940 (R. 20). The time to file a petition for writ of certiorari was extended until June 7, 1940, by orders of Chief Justice Hughes signed on March 26, 1940, and May 8, 1940 (R. 20). The petition for writ of certiorari was filed June 6, 1940 (R. 21). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

## QUESTIONS PRESENTED

1. Whether, under Section 23 (r) of the Revenue Act of 1932, petitioner may offset losses on the sale of noncapital securities owned by him as an individual against his 91% share of the profits of a partnership derived from the sale of noncapital securities.

2. Whether petitioner may raise the foregoing question, in view of the fact that he failed to raise it below.

## STATUTE INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * * * *
>
> (e) LOSSES BY INDIVIDUALS.—Subject to the limitations provided in subsection (r) of this section, in the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—
>
> * * * * * *
>
> (2) if incurred in any transaction entered into for profit, though not connected with the trade or business;
>
> * * * * * *
>
> (r) LIMITATION ON STOCK LOSSES.—
>
> (1) Losses from sales or exchanges of stocks and bonds (as defined in subsection (t) of this section) which are not capital assets (as defined in section 101) shall be

allowed only to the extent of the gains from such sales or exchanges (including gains which may be derived by a taxpayer from the retirement of his own obligations).

* * * * *

## STATEMENT

The special findings of fact of the court below (R. 6–14) may be summarized as follows:

Petitioner, a resident of New York State, is engaged in buying and selling securities principally on the New York Curb Exchange (R. 6).

During the year 1932, petitioner and three others, named Leonard C. Greenstein, Milton Stern, and Cecil Schwartz, were associated in the securities business. The individual interest of each in the enterprise was as follows (R. 10):

| | |
|---|---|
| Emil Mosbacher | 91% |
| Leonard C. Greenstein | 5% |
| Milton Stern | 2% |
| Cecil Schwartz | 2% |

Petitioner filed an individual income tax return for the calendar year 1932 on March 15, 1933, showing a net income of $63,263.59. On the same day, a return signed by him was filed on a partnership return form 1065 for the association (R. 6–7).

By letter dated May 8, 1935, the Commissioner of Internal Revenue advised petitioner that he proposed to make an additional individual assessment of $49,564.22, which assessment, together with interest of $6,293.30, was paid by petitioner July 17, 1935 (R. 7–8).

On October 9, 1936, petitioner filed a claim for refund for 1932 of $55,857.52 on the ground that a loss of $130,434.27 on the sale of securities held less than two years had not been allowed as a deduction against petitioner's share of the profits on the sale of noncapital securities by the association (R. 8).

On April 9, 1937, the Commissioner advised petitioner of his proposed rejection of this claim, stating as his principal ground that the association was a partnership, and that, therefore, petitioner's individual losses could not be offset against the profit which was derived by him from the partnership (R. 9).

Prior to and while some of the actions heretofore referred to were being taken, petitioner filed protests and briefs in connection with his tax liability for the years 1930 and 1932 in which he characterized the association as a "partnership" (R. 9).

The arrangement under which the association was conducted was the result of a verbal agreement made originally on April 14, 1930, and renewed in December, 1931, for the year 1932. No mention was made by petitioner or any of the parties as to whether any loss which the association might incur would be shared in by Greenstein, Stern, or Schwartz, and no loss was incurred in any of the years in which the association operated (R. 11–12).

All four associates were members of the New York Curb Exchange, but all business was transacted in the name of petitioner and all brokerage

accounts were maintained in his name. Petitioner contributed all of the capital for the operation of the business, but each of the four members had drawing accounts based on an estimate of their net worth to the firm (R. 12). Petitioner maintained separate profit and loss accounts for his individual business and for the firm business (R. 13).

On the basis of these findings of fact, the court below found as a conclusion of law that petitioner was not entitled to the refund sought (R. 14).

## ARGUMENT

The sole issue presented to the court below was whether or not the association involved constituted a partnership (R. 6, 14). Petitioner does not now dispute the court's determination that the association was a partnership, but urges that certiorari should be granted because the question of whether individual security losses may be offset against partnership security profits is before this Court in the case of *Neuberger* v. *Helvering*, No. 5, October Term, 1940, certiorari granted May 27, 1940. Petitioner further urges that the court below erred in following *Johnston* v. *Commissioner*, 86 F. (2d) 732 (C. C. A. 2d), and *Klingenstein* v. *United States*, 18 F. Supp. 1015 (C. Cls.), and that its decision is in conflict with *Jennings* v. *Commissioner*, 110 F. (2d) 945 (C. C. A. 5th), and *United States* v. *Coulby*, 258 Fed. 27 (C. C. A. 6th).

It is true, as alleged by petitioner, that the court below applied the rule of the *Neuberger*, *Johnston*,

and *Klingenstein* cases. And since the *Neuberger* case is now pending before the Court, we would ordinarily be inclined to acquiesce in the petition. However, it appears that nowhere in the proceedings below, neither on brief nor in oral argument, did petitioner attack the rule of these cases: he contended simply that the association was not a partnership, thereby attempting to circumvent the result reached in those cases. There is considerable doubt whether it is open to petitioner to raise the issue now. Cf. *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, 380. In the circumstances, it would seem inappropriate for the Court to grant certiorari.

CONCLUSION

Although this would ordinarily be an appropriate case for certiorari, since the court below applied the rule of law involved in the pending *Neuberger* case, we believe that certiorari should be denied in view of the procedural impediment.

Respectfully submitted.

FRANCIS BIDDLE,
*Solicitor General.*
SAMUEL O. CLARK, JR.,
*Assistant Attorney General.*
SEWALL KEY,
HUBERT L. WILL,
*Special Assistants to the Attorney General.*

JULY, 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940

No. 128. MOSBACHER *v.* UNITED STATES. On petition for writ of certiorari to the Court of Claims. November 18, 1940. *Per Curiam:* The petition for writ of certiorari is granted, the judgment is reversed, and the cause is remanded to the Court of Claims for further proceedings. *Neuberger* v. *Commissioner of Internal Revenue, ante,* p. 83. *Messrs. Mark Eisner* and *Ferdinand Tannenbaum* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Mr. Sewall Key* for the United States. Reported below: 90 Ct. Cls. 247; 30 F. Supp. 703.